No such widespread discontent, no such outpouring of criticism, would be possible were there not real causes for it. Some of the evils complained of, it will readily be granted, are wholly imaginary, but many of them are real and cannot be ignored. We need the coöperation of the learned societies, the scientific bodies, the religious denominations and all other organizations that are capable of aiding the cause, whether it be in the inculcation of higher standards of respect for law, the diagnoses of causes, the collection of data bearing upon the conditions which must be dealt with, the investigation of results obtained elsewhere, the remedies to be applied, and so on. The bar associations in many states are earnestly considering schemes of reform, and everywhere there is an evident desire among the better class of lawyers to remove the cause of the popular discontent. Intelligent and constructive coöperation of all organizations should, therefore, and doubtless will, be welcomed.

J. W. G.

TWO CALIFORNIA JURISTS ON LAW REFORM.

The JOURNAL has recently had the privilege of presenting to its readers two admirable papers on law reform by two of the most distinguished jurists of California, Mr. Justice Sloss, of the Supreme Court, and Judge Lawlor, of the Superior Court. The defects of our present procedure and the remedies, as pointed out in these two papers, deserve the thoughtful consideration of the bench and bar, to say nothing of the legislatures, from whom much of the relief must come, if it comes at all. Mr. Justice Sloss frankly admits that there is much force in the criticism that the entire scheme of procedure is too cumbersome and inadequate and that improvement may and should be had. In the second place, he says, the objection that the law in its present condition gives the accused too great an advantage as against the state is well founded. In the third place, the delays with which prosecutions are disposed of is an evil the seriousness of which cannot be over-estimated. Both he and Judge Lawlor dwell upon the evil practice of reversing convictions justly obtained, upon errors which do not affect the merits of issues. Where there has been a painstaking and laborious trial of the facts before a court and a jury, says Justice Sloss, and the result has been the establishment of guilt, the entire proceeding has been reduced to a futility if the judgment is reversed upon some ground which has no direct relation to the ultimate question of guilt or innocence. The practice of considering on appeal, says Judge Lawlor, virtually every question that is raised reduces the final authority of the trial court to a minimum, involves voluminous records, delays justice and fosters lawlessness. The verdict of the jury and the judgment of the trial court

constitute but the preliminary skirmish in the contest. Causes, he says, are frequently reversed on points which have never been raised in the trial court at all—a practice which is opposed to every rule of order and common sense. And, what is the worst feature of it all, he adds, reversals in the great majority of cases result in the defeat of justice.

Both jurists point out the evils resulting from the wide latitude of appeal now allowed, and, though neither would abolish appeals, both believe the privilege should be restricted to more reasonable limits or properly safeguarded so as not to obstruct justice. When the guilt of the accused has been fairly established, says Judge Lawlor, the conviction should never be disturbed by a higher court except upon considerations of the gravest character. The accused is entitled to a day in court, not two days or three days, and when he has had his day, with every presumption of innocence in his favor and with the benefit of every reasonable doubt, he has had every right to which he is justly entitled. The protection of the innocent is the prime aim of the criminal law, but it is also necessary to the protection of the innocent that the guilty shall be punished.

Justice Sloss favors the adoption of the English rule which allows the Court of Criminal Appeal to dismiss the appeal, notwithstanding substantial errors have been committed by the trial court, if, upon an examination of the entire record, the appellate court is satisfied that the conviction was just and that the same result would have been reached if the error had not been committed. Under the practice prevailing in the United States, material error always works a reversal, even though the appellate court may be clearly satisfied that there has been no miscarriage of justice.

Justice Sloss is also of the opinion that the higher courts should be given power in criminal cases to review questions of fact as well as of law, to the extent that it may be necessary to determine whether any error of law has worked substantial injustice to the appellant. Both jurists plead for the enlargement of the power of the judge in the conduct of the trial. Justice Sloss points out that in the English courts and in the American federal courts the trial judge has the power to sum up the evidence and comment on its weight to the jury, and that the exercise of this power has not resulted in the return of verdicts unwarranted by the facts. Judge Lawlor thinks the judge should have more power to deal with litigants, witnesses and counsel. Under the present practice, the authority of the court may be challenged at every turn and exceptions taken to every act and word of the court which does not meet the approval of counsel and client. This practice weakens

the authority of the court, diminishes respect for it, and is often resorted to for the purpose of destroying the effectiveness of the judge with the jury. The court and the prosecuting attorney are on trial and the proceeding is largely a contest over errors the results of which are deplorable in the extreme.

Both judges condemn the present rule in regard to the qualifications of jurors. No man, says Judge Lawlor, who has formed or expressed an opinion upon the matter or cause to be submitted to the jury should be held disqualified if it appears that he can and will act favorably and impartially, provided such opinion is not founded upon a personal knowledge of facts material to the issue, or upon statements made in the presence and hearing of the challenged person by one having or claiming to have such personal knowledge. No man should be disqualified for jury service because he has read the newspapers or formed an opinion upon hearsay evidence unless the opinion is so fixed that it cannot be removed by evidence which leads to a different conclusion. With the present facilities provided by the press for discriminating information concerning the facts of crime, it is difficult to find a jury no member of which has not formed an opinion as to the guilt or innocence of the accused, especially in cases which have attracted widespread interest in the community. Under such circumstances the citizen cannot keep abreast of the times without rendering himself ineligible to jury service. In short, the more he informs himself the less likely is he able to meet the requirements for sitting on the trial of cases. The present rule is made use of by counsel, not to secure fair and intelligent jurors, but rather those who will meet the needs of the defendant's situation. It often leads to long delays in the starting of trials and constitutes one of the greatest abuses in the administration of the criminal law. Moreover, the state should have the same number of peremptory challenges as are allowed the defendant. Judge Lawlor thinks the numerous exemptions from jury duty should be limited and the exempt class confined to clergymen, doctors, druggists and lawyers. He also advocates legislation making it a crime for any newspaper to attempt to corrupt public opinion and thereby interfere with the impartial determination of cases on their merits. The abuse of the rules of reasonable doubt, moral certainty and presumption of innocence, he thinks, ought to be reduced by legislation defining the elements of those facts.

Both jurists advocate the abolition of the unanimity requirement for verdicts in all criminal cases except capital offenses. Mr. Justice Sloss points out that in the trial of civil cases three-fourths of the jury may render a verdict, and that there is no reason to believe that it

would not work satisfactorily in criminal cases. The great advantage of such a rule would be that it would always insure a verdict, notwithstanding the opposition of a stubborn and corrupt juror. Judge Lawlor also suggests that the double-jeopardy immunity be modified so that the privilege will not apply to the case of a mistrial or the retrial of an action. Under the present practice, he says, a person who is charged with murder and convicted of manslaughter cannot be again tried for murder, on the theory that the verdict for manslaughter was in legal effect an acquittal of murder. Mr. Justice Sloss advocates a modification of the constitutional guarantee relating to the exemption of the accused from testifying against himself. As the provision is now generally construed, it not only exempts the accused from being required to testify in his own trial, but that his refusal or failure to do shall not be considered by the jury as a circumstance tending to establish his guilt. Such a theory, says Justice Sloss, is contrary to the common experience in the ordinary affairs of life. Why, he asks, should not the mental processes that influence thought and action in other relations of life have weight in criminal trials? It is no abandonment of the doctrine of presumed innocence to say that when the prosecution has shown a state of facts which points to the guilt of the accused and those facts are such that a denial or explanation of them by him would tend to establish his innocence, his failure or refusal to make that denial or give that explanation may be considered by the jury as an item of evidence bearing upon the question to be decided.

In conclusion, Justice Sloss declares that the need of a more rational and less technical administration of our criminal law has long been apparent, and has now come to be regarded as imperative. To those who have made the law their life study the community has a right to look for guidance in the effort to find a way to make that law more effective. J. W. G.

ENGLISH AND AMERICAN PROCEDURE COMPARED AGAIN.

A member of the Rochester (N. Y.) bar, in the March number of *Case and Comment,* takes issue with us on the proposition that the English methods of administering justice are more efficient than those prevailing in most parts of the United States. In the first place, he argues, "conditions in England are wholly different from those in this country;" and then he proceeds to draw a comparison between the vast difference in the geographical areas of the two countries, overlooking the fact that many of the states, which are the units for the administration of justice in all but a comparatively few concerns, are in reality